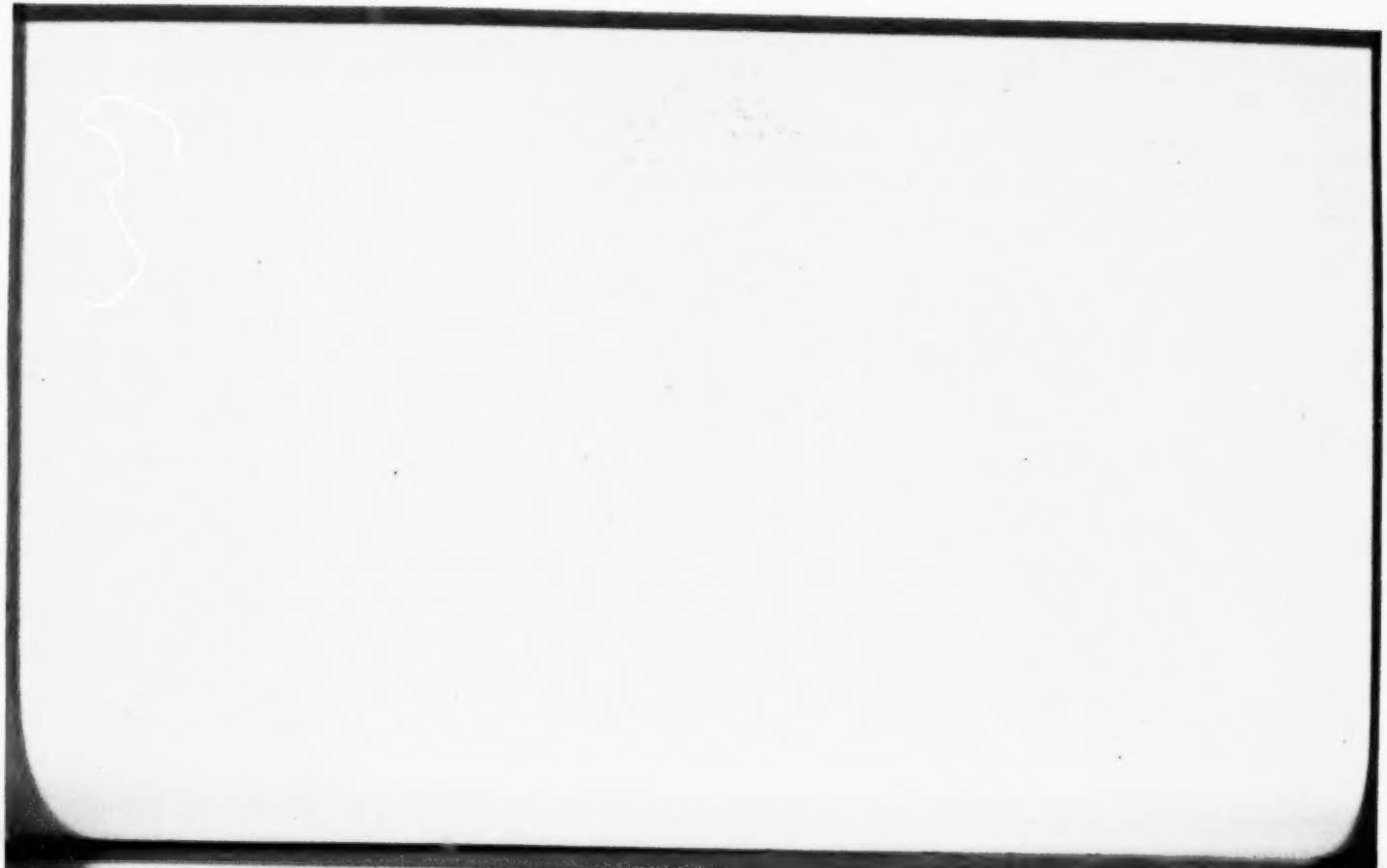
SUBJECT INDEX

	Page
Concise Statement of Case	1
Questions Involved	9
Argument	10
Conclusion	12



In The

Supreme Court of the United States

OCTOBER TERM, 1949

No. 550

CHARLOTTE L. BLOCK, HAROLD BLOCK, MAX N. BLOCK, SYLVIA B. FISH, BERNARD SHULMAN, FRED H. WOLF, and LILLIAN WOLF,
Petitioners,
vs.
DETROIT HARBOR TERMINALS, INC.,
a corporation,
Respondent

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS, SIXTH CIRCUIT

CONCISE STATEMENT OF CASE

A writ of certiorari is sought to review an order of the Circuit Court of Appeals of the Sixth Circuit affirming orders of The District Court on two appeals consolidated

in the Circuit Court of Appeals for argument. We find it necessary to make a statement of the case because of the many inaccuracies and omissions in opposing counsel's statement.

On Saturday, February 19, 1949, the petitioners, stockholders of the respondent corporation, filed the complaint in this cause and noticed for hearing on February 23, 1949, their motion for a temporary injunction, to restrain the annual stockholders' meeting which had been duly noticed for the same date, February 23, 1949. Service was not made on the defendant corporation until Monday, February 21, 1949, only two days before the date set for the hearing on the injunction. The following day, February 22, 1949, was Washington's birthday, a legal holiday, and the Courts were closed. Federal Rule 6 excludes legal holidays so that defendant had actually only one day's notice of the hearing on the requested injunction. Within the period between February 21, 1949 and the Court hearing on the morning of February 23, 1949, the defendant prepared and filed a sworn answer. This sworn answer was filed in opposition of the granting of an injunction, instead of the filing of affidavits in objection thereto (R. 61).

Petitioners claim to have made a demand for a list of respondent's stockholders (R. 4) as set forth in paragraph 3 of the complaint. The demand is dated at Chicago on February 14, 1949, one week before the annual stockholders' meeting. The complaint fails to show the claimed time of presentation. The demand refers to the undersigned as registered stockholders, but the names of the undersigned are omitted from the complaint. Respondent contends (R. 15-16) that the alleged demand was in fact not signed by all the petitioners and that the petitioners who did actually sign, held less than 2 per cent of the

company's stock between them (R. 12). The total number of shares of the Detroit Harbor Terminals, Inc., authorized under the plan of reorganization was 71,000 and the stock outstanding was slightly less than this amount (R. 48). The sworn answer sets forth that no demand was ever refused to the stockholders Fred H. Wolf and Lillian Wolf, who are petitioners and own 570 shares, and that the total number of shares held by all of the other petitioners is only 307 shares (R. 16). A photostat copy of the claimed demand is included in the appendix of respondent Brief in the Circuit Court of Appeals. Respondent denies having refused any demand in which all the petitioners joined, or in which stockholders owning a total of 2 per cent of the respondent's stock (R. 12) joined.

The sworn answer of the respondent (R. 10-17) with attached Exhibits (R. 18-49) was relied upon by the defendant not only as an answer in the trial on the merits, but was also relied on for consideration by the Court in passing upon the request for an interlocutory injunction. Among the sworn allegations are that the petitioners are not actuated by motives that are lawful and proper and that the stock list is sought to further petitioners' personal ends, either in the manipulation of the stock or for their own gain to the injury of other minority stockholders. That the petitioners, though familiar with the date of the annual meeting, delayed a request for a list of stockholders until such time as the granting of injunctive relief to restrain the annual meeting would greatly inconvenience other stockholders coming from points as distant as New York and Chicago. That the petitioners in their Complaint have intentionally failed to make proper disclosure as to the nature of the company's business and the use of its cash as a part of its business in loans

to customers. Further that the claim the company failed to pay dividends is not made in good faith because of the restrictions upon the payment of dividends under the plan of reorganization until such time as a first mortgage bond issue in the sum of $780,000.00 was retired. The answer repeatedly avers that no individual petitioner owns two per cent of the respondent's stock and further that no combination of petitioners owning a total of two per cent of the respondent's stock ever made a demand for a list of respondent's stockholders which demand was refused. It is the claim of the respondent that if the lower court should find in a trial on the merits that a demand was not made by stockholders holding a total of two per cent of the respondent's stock, that no further consideration need be given to any other issues in the case raised by the pleading before amendment. Respondent does not in any manner concede that such a demand of a group of stockholders constituting two per cent would be a valid demand, if made and denies the validity of such a demand.

Petitioner now contends the Jurat to the sworn answer was on information and belief. This question was raised for the first time in the reply brief filed in the Circuit Court of Appeals. A search of the Record including Petitioner's statement of facts and errors complained of and the entire first brief filed in the Circuit Court of Appeals disclose no reference to this claimed faulty Jurat. The question was not raised for consideration by the trial Court.

Respondent contends the District Court properly considered the sworn answer on the record before it and in addition thereto that the District Court had other evidence to consider in denying the temporary injunction as follows:

1. The stock held by petitioners was originally issued as part of a plan of reorganization consummated in the same Court in which these proceedings were had under Section 77B of the Federal Bankruptcy Act and the Court had its own Records and files disclosing

(a) Fifty (50%) per cent of the gross income must be applied in retirement of a $780,000.00 first mortgage bond issue.

(b) That no dividend could be paid on the common stock until all first mortgage bonds were retired.

(c) That the nature of the corporate business was the loaning of money to customers and

(d) That most of the stockholders resided outside the State of Michigan.

2. The laches of petitioners in making the demand and filing the complaint it appearing from paragraph 5 of the complaint and the statements of Counsel (R. 5 and 7) that petitioners claim to have made a previous demand and as the District Judge found knew the approximate date of the annual meeting.

The lower Court denied the request for a temporary restraining order and the annual meeting was held as scheduled at 11:00 a.m. on February 23, 1949. The same directors were reelected the status quo being maintained in this respect. A current dividend of 50 cents per share was suggested by the stockholders at their annual meeting (R. 55). Subsequent to the stockholders' meeting the directors met and declared a dividend of 50 cents. All the plaintiffs have received the dividend declared on February 23, 1949 and have cashed their dividend checks. The Kuschinskis referred to in the motion to amend

have likewise cashed said dividend checks paid to them and also voted on all matters at the annual meeting. All have also received and cashed a subsequent dividend of 50 cents declared in December 1949.

Sections 35 and 45 adopted at the same time as part of the same general act are the two sections of the Michigan Corporation Code governing the right of stockholders to examine the books of the corporation, including the stock books. Section 35 appears on page 11 of the petition but plaintiffs have ignored Section 45, reading in part as follows: Section 45 (Mich. Stat. Ann. 21.45) Books; Statement of Operations and Properties, Fee; Inspection:

> "The books of account and stock books of a corporation shall be open to the inspection of every shareholder holding of record, in the aggregate, two (2) per cent of the outstanding capital stock of the corporation (or two (2) per cent of any class of such stock, if two (2) or more classes have been issued) and who shall have been a shareholder of record for at least three (3) months prior thereto, at all reasonable times *for any proper purpose.*" (Emphasis supplied.)

Attached to the hurriedly prepared answer of the respondent was a motion to dismiss. The respondent's position always has been that it did not desire to urge the motion to dismiss on technical grounds, but desired to make full and complete disclosure to the Court (R. 59) and have an early trial on the merits (R. 151). The case was set down by Court order for trial on June 27, 1949 (R. 125) and would have been set for an earlier date had not an attorney for the petitioners planned a trip to Europe (R. 153-154). After the second appeal, herein referred to, it was the position of counsel for the petitioners that the trial could not be had until after the de-

termination of the matters appealed from and the date of trial was continued without date pending the disposition of the appeal.

The time of the denial of the temporary restraining order was approximately 10:30 a.m. February 23, 1949. This was about one-half hour before the time set for the annual meeting. On the same date, February 23, 1949, petitioners filed their appeal to the Circuit Court of Appeals from the order denying the temporary restraining order and from the claimed denial of the motion to amend. The order appealed from was entered late in the afternoon of February 23, 1949, and little time intervened on that date before the closing of Court hours. Subsequent to this date and after the appeal, the District Court filed written findings of fact and law, as required by Court Rule 52, on granting or denying of an interlocutory injunction. The findings of fact and law appear in the record (R. 113-115). The bond on appeal was filed subsequent to the finding of fact and law. Petitioners now complain that the findings of fact and law were made after the appeal taken on the same day as the entry of the order appealed from.

A hearing was had before the District Court at approximately 3:30 p.m. on the form of order to be entered. At this time petitioners' counsel moved orally to amend the complaint. Respondent's counsel present objected to the consideration of the amendment at that time, after answer and in the absence of his associate counsel, but did not object to the filing of a motion to amend and hearing thereon. After a discussion by counsel in open Court it was agreed that the petitioners would file the proposed amendment in writing and a hearing would be held thereon in open Court on the following Monday, February 28, 1949 (R. 95). The District Court did not pass upon

the oral motion to amend and no formal order was ever entered denying this verbal motion. The written motion to amend, later filed, was identical with the proposed oral motion. Notwithstanding the non-entry of an order denying the verbal order to amend, and the agreement to file a written motion to amend (R. 95) petitioners on the same date, February 23, 1949 appealed from the claimed denial of the oral motion to amend and also from the formal order entered denying the temporary injunction (R. 50). This is referred to as the first appeal, Court docket No. 10,898, which was later consolidated with Case No. 10,916, referred to as the second appeal.

The respondent filed written objections to the written motion to amend the complaint (R. 103) and the hearing on the motion to amend and the objections thereto were continued to March 7, 1949. In the meantime, on Friday, March 4, 1949, less than four days before the adjourned date of hearing, petitioners filed a motion to strike certain defenses, to overrule motion to dismiss, to overrule objections, to motion to amend the complaint, and to strike the affidavits in support of said objections, and noticed the same for hearing on Monday, March 7, 1949. Notice given on this motion was less than that required under Federal Rule 6, Subdivisions A and D and the hearing on all matters in the District Court was continued to March 24, 1949.

The Court convened on the adjourned date, March 24, 1949, for consideration of the pending motions. In the meantime counsel for the petitioners and respondent filed briefs with the Court. The disposition made of the pending motion appears in the findings of the Court (R. 151-153) and the order of the Court (R. 124). The said Court order also set the case down for an early trial on the merits and the disposition of the motion to strike, the

motion to dismiss and the motion to overrule the motion to dismiss, on a date agreeable to all counsel (R. 153). The petitioners thereupon filed a second appeal (R. 125) appealing from the "denying plaintiffs' motion for leave to file the amendment to the complaint, denying the motion to strike the affidavits and to overrule the objections and refusing to pass on the motion to overrule the motion to dismiss and to strike certain defenses". By order of the Circuit Court of Appeals one brief was filed on the first appeal, Docket No. 10,898, and said second appeal, Docket No. 10,916.

The Circuit Court of Appeals held (R. 173) that in its opinion there was no reversible error in the records, affirmed the orders and decrees appealed and remanded the cause for further proceedings.

QUESTIONS INVOLVED

An examination of the Record on which the Circuit Court of Appeals found no reversible error discloses that the errors complained of below were primarily the abuse of discretion of the District Court as follows:

1. The errors complained of in the first appeal are summarized as follows by petitioner (R. 99):

> The denial of the motion for a temporary restraining order was an abuse of the discretion of the court, and the order should be reversed, and all proceedings had thereafter should be declared null and void.

2. The errors complained of in the second appeal are summarized as follows by petitioner (R. 126):

> (a) The court abused its discretion in overruling the motion for leave to file the proposed amend-

ment, in denying the motion to overrule the objections to the motion to amend the complaint and to strike the affidavits.

(b) The court abused its discretion in postponing the determination of the motion to strike certain defenses and to overrule the motion to dismiss until the date of trial, and it was its duty to allow the amendment to sustain the motion to overrule the objections and to strike the affidavits, and to overrule the motion to dismiss and to strike certain defenses.

ARGUMENT

We have refrained from burdening this Court with the citation of unnecessary authorities. The purpose of this Brief is to show no justification for granting the requested writ. The matters complained of were all discretionary with the District Court and the Circuit Court of Appeals found no reversible error.

There is no substance to the claim the District Judge erred in interpreting the Federal rules. The grievances complained of are in the Court setting the case for an early trial and holding pending motions in abeyance until the time of trial. The District Judge could not have done otherwise because

1. A sworn answer was filed two days after the service of the complaint and was presented to the Court on a hearing for a temporary restraining order. An order was entered by the Court denying the motion for a temporary restraining order, and the plaintiffs have appealed from this order. The Appellate Court must have before it all matters which were before the Lower Court in denying the temporary restraining order, which in-

cludes the complete answer of defendant with nothing stricken.

2. The Court did grant a portion of the motion to amend the complaint in respect to what transpired at the annual stockholders' meeting and also granted the requested amended prayer reading as follows:

> "Wherefore, plaintiffs pray in addition to the reliefs prayed for in the original Complaint that the Court declare the election void and all proceeding had at the meeting to be of no force and effect, or in the alternative if it should declare that the meeting was valid, then it should declare that the members of the old board were ineligible to office and that the only member of the Board of Directors who was properly elected was the said Alfred Kuchinski, and that the Court may grant such other relief as to equity may seem proper" (R. 91, 92).

The amended complaint and the amended prayer raised new issues of fact and law and respondent was thereafter required to address all pleadings, including answer and any motion to dismiss to the complaint as amended.

3. The vexatious pattern of plaintiffs' conduct of this case is apparent from the record. A studied attempt has been made to raise interminable issues of pleading by numerous motions having little or no connection with the merits of the case, all filed as a part of a concerted plan of vexatious litigation. These appeals are cut from the same pattern. The Lower Court set the case for trial at the earliest date convenient to counsel for the plaintiffs. The respondent and the Court did everything possible to have an early trial and an early determination of the legal issues involved in the complaint as amend-

ed, and if these appeals had not been taken this whole case would have been decided on its merits last June.

CONCLUSION

We are prepared to file an extensive Brief should the writ of certiorari be granted. The decision of the lower court was not final. No good ground for granting the writ exists, we contend the petition should be denied.

Respectfully submitted,

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